

Virginia Regulatory Town Hall

Final Regulation Agency Background Document

Agency Name:	Virginia Department of Health
VAC Chapter Number:	12VAC5-585
Regulation Title:	Biosolids Use Regulations
Action Title:	Final
Date:	March 24, 2003

Please refer to the Administrative Process Act (§ 9-6.14:9.1 *et seq.* of the *Code of Virginia*) , Executive Order Twenty-Five (98), and the *Virginia Register Form, Style and Procedure Manual* for more information and other materials required to be submitted in the final regulatory action package.

Summary

Please provide a brief summary of the new regulation, amendments to an existing regulation, or the regulation being repealed. There is no need to state each provision or amendment, instead give a summary of the regulatory action. If applicable, generally describe the existing regulation. Do not restate the regulation or the purpose and intent of the regulation in the summary. Rather, alert the reader to all substantive matters or changes contained in the proposed new regulation, amendments to an existing regulation, or the regulation being repealed. Please briefly and generally summarize any substantive changes made since the proposed action was published

The ***Biosolids Use Regulations*** (12 VAC 5-585) were initially adopted by the State Board of Health, in response to HB1067 (1994), which added Sections 32.1-164.5 and 62.1-44.19:3 of the *Code of Virginia* pertaining to standards and permits required for land application, marketing, or distribution of biosolids. The ***Biosolids Use Regulations (Regulations)*** became final in January 1995. A notice was published in the July 10, 1995, issue of the *Virginia Register* requesting additional public comments on certain provisions of the *Regulations*. Technical corrections to the *Regulations* were published in the August 21, 1995, issue of the *Virginia Register*.

Proposed amendments were published in the May 12, 1997, issue of the *Virginia Register* and, on August 15, 1997, the State Board of Health, at its regular business session, adopted final amendments to the *Regulations*, pursuant to the authority granted by Section 32.1-12 and 32.1-164 of the *Code of Virginia*. The final amendments were published in the September 15, 1997 issue of the *Virginia Register* and the amended *Regulations* became final on October 15, 1997.

New amendments are being proposed to carry out the provisions of legislation signed into law by the Governor, requiring the State Board of Health to adopt regulations by January 1, 2003,

providing for fees to be collected from land appliers of biosolids and used to reimburse local governments for specified land application monitoring expenses.

Changes Made Since the Proposed Stage

Please detail any changes, other than strictly editorial changes, made to the text of the proposed regulation since its publication. Please provide citations of the sections of the proposed regulation that have been altered since the proposed stage and a statement of the purpose of each change.

The final amendments to the *Regulations* include: changes to several definitions (Section 10), to provide clarification of terms, revisions to the *Regulations* Advisory Committee (Section 270) to specify representation by specific stakeholders and revisions to certain requirements as specified in Part VI (Sections 720 to 740), addressing the reimbursable charges for local monitoring, requirements for submitting reimbursement requests by local government and the procedures for processing the reimbursement requests, to provide further clarification of those requirements.

Statement of Final Agency Action

Please provide a statement of the final action taken by the agency .including the date the action was taken, the name of the agency taking the action, and the title of the regulation.

The State Board of Health adopted the proposed fee amendments as final amendments at their January 31, 2003, meeting in Richmond, Virginia.

Basis

Please identify the state and/or federal source of legal authority to promulgate the regulation. The discussion of this statutory authority should: 1) describe its scope and the extent to which it is mandatory or discretionary; and 2) include a brief statement relating the content of the statutory authority to the specific regulation. In addition, where applicable please describe the extent to which proposed changes exceed federal minimum requirements. Full citations of legal authority and web site addresses, if available for locating the text of the cited authority, shall be provided. If the final text differs from that of the proposed, please state that the Office of the Attorney General has certified that the agency has the statutory authority to promulgate the final regulation and that it comports with applicable state and/or federal law

Legislation passed by the General Assembly (HB 2827, Acts of Assembly c. 831, 2001) and signed into law by the Governor, amended Section 62.1-44.19:3 of the *Code of Virginia* (available electronically at <http://leg1.state.va.us/cgi-bin/legp504.exe?000+cod+62.1-44.19C3>), requiring that by January 1, 2003, the State Board of Health adopt regulations requiring the payment of fees for the land application of biosolids, within local jurisdictions with adopted ordinances providing for the testing and monitoring of such operations, to ensure compliance with applicable laws and regulations. The collected fees will be used to reimburse approved costs of the local monitoring efforts. The necessary documentation will be forwarded to the

State Registrar to initiate final approval of the fee amendments in accordance with the Administrative Process Act and the Virginia Department of Health Public Participation Guidelines.

Purpose

Please provide a statement explaining the need for the new or amended regulation. This statement must include the rationale or justification of the final regulatory action and detail the specific reasons it is essential to protect the health, safety or welfare of citizens. A statement of a general nature is not acceptable, particular rationales must be explicitly discussed. Please include a discussion of the goals of the proposal and the problems the proposal is intended to solve.

The *Regulations* provide the means to protect public health from improper and unregulated disposal of sewage sludge. The new proposed amendments will require the payment of a fee for land application of sewage sludge (biosolids) as permitted through an Operation Permit (VDHBUR) issued by the Virginia Department of Health (VDH). The fees will be collected from persons who are permitted to apply biosolids in local jurisdictions that have adopted an ordinance that provides for the testing and monitoring of the land application of biosolids in order to ensure compliance with governing laws and regulations. The fee shall not exceed the amount necessary to reimburse the local jurisdictions for the direct costs of a reasonable amount of testing and monitoring. The fee shall be imposed on each dry ton of biosolids applied to land in local jurisdictions that have adopted an ordinance.

Substance

Please identify and explain the new substantive provisions, the substantive changes to existing sections, or both where appropriate. Please note that a more detailed discussion is required under the statement of the regulatory action's detail.

An Ad Hoc Advisory Committee has assisted the VDH in developing draft amendments to the *Regulations* for presentation to the Board of Health for approval as proposed amendments in accordance with the Administrative Process Act (APA). Final amendments to the *Regulations* will have to be adopted by the end of December 2002 in accordance with the APA, in order to meet the deadline mandated in Section 62.1-44.19:3 of the *Code of Virginia*. The amended *Regulations* shall include requirements and procedures for:

1. Collection of fees from land appliers by the VDH;
2. Retention of proceeds in a special nonreverting fund to be administered by the VDH; and
3. Disbursement of proceeds by VDH the to reimburse counties, cities and towns with duly adopted ordinances providing for the testing and monitoring of the land application of sewage sludge, as provided for in Section 62.1-44.19:3 of the *Code of Virginia*.

The persons land applying sewage sludge shall (i) provide advance notice of the estimated fee to the generator of the sewage sludge unless notification is waived, (ii) collect the fee from the

generator, and (iii) remit the fee to the Department of Health as provided for by the Final Regulation.

Issues

Please provide a statement identifying the issues associated with the final regulatory action. The term "issues" means: 1) the advantages and disadvantages to the public of implementing the new provisions; 2) the advantages and disadvantages to the agency or the Commonwealth; and 3) other pertinent matters of interest to the regulated community, government officials, and the public. If there are no disadvantages to the public or the Commonwealth, please include a sentence to that effect.

The Ad Hoc Advisory Committee met on 7 different occasions and developed recommendations that were used to establish the biosolids fee for the proposed amendments as follows:

1. The fee shall be two dollars and fifty cents (\$2.50) per dry ton of biosolids land applied in counties, cities or towns that have adopted local ordinances, to be adjusted annually in accordance with the federal consumer price index (CPI).
2. Disbursement of the established fees collected by the Division shall be made to reimburse those counties, cities and towns with duly adopted local ordinances, that submit acceptable documentation of reimbursable expenses as provided for in the amended *Regulations* and as described in a Biosolids Fee Guidance Manual provided to local governments and land appliers by the Division.

The majority of the committee members were in favor of a slightly lower average fee. Other committee members were in favor of a significantly higher fee and submitted a minority report recommending a biosolids fee of up to \$4.00 per dry ton.

The draft amendments to the Biosolids Use Regulations were presented to the Board of Health and approved as proposed amendments on April 26, 2002. During the subsequent fiscal impact analysis of the proposed amendments, conducted by the Department of Planning and Budget (DPB) staff, concerns were expressed that the proposed procedures for reimbursing local governments did not establish a maximum level for such expenses, in relation to the land application fee. As a result of the DPB concerns, several revisions were made to the proposed amendments to provide for a reimbursement cap and to address comments received from the Office of the Attorney General.

As a result of the comments received from the DPB staff, specific reimbursement levels for local monitoring expenses were introduced into the proposed amendments as follows:

If sufficient revenue is received, monthly claims will be released in order of receipt, with reimbursement of at least \$2.50 per dry ton of biosolids land applied in that County during the period of time specified in the submitted invoice, prior to releasing any current claim payments above \$2.50 per dry ton of biosolids land applied. If sufficient revenue remains following those payments, then delayed claims above \$2.50 per dry ton of biosolids land applied in that County, during the period of time specified in the submitted

invoice, may be released for reimbursement of up to \$4.00 per dry ton of biosolids land applied in that County, based on their placement on the claims listing by date of receipt.

The advantage of providing fees to support local monitoring of biosolids land applicers is that the credibility of this controversial state permit program will be enhanced. The availability of resources to support routine surveillance of land application of biosolids, was deemed by the public and local government, to be a key issue in assuring the safety of those operations. However, other sewage sludge management options are more expensive than is land application of biosolids.

The disadvantage of establishing biosolids fees is that the monthly bills for sewer service will likely increase and that increase will be passed down to the users, those citizens of the Commonwealth served by centralized sewer systems. The owners of sewage treatment works have previously estimated that 20% to 40% of the costs, of constructing and managing those facilities, are used for sludge management.

By establishing a reasonable biosolids fee the most economical and most beneficial means of sludge management will continue to be available to the owners of sewage treatment works, who are primarily metropolitan governments.

Public Comment

Please summarize all public comment received during the public comment period and provide the agency response. If no public comment was received, please include a statement indicating that fact.

A Notice of the public comment period for the proposed amendments was forwarded to the State Registrar of Regulations and published in the *Virginia Register* on November 4, 2002. The 60 day public comment period ended on January 6, 2003. Two public hearings were scheduled and held. The first hearing was on November 12, 2002, in Spotsylvania County and the second hearing was on November 13, 2002, in Henrico County. The summary of public comments received and the agency response is as follows:

SUMMARY OF COMMENT	AGENCY RESPONSE
<p>The Department of Planning and Budget (DPB) Economic Impact Statement published with the proposed amendments in the <i>Virginia Register</i> recommended removing the proposed commitment to increase the biosolids fee if claims exceed fee collection. However, the DPB statement also recommended revising the proposed amendments to allow adjustments of the reimbursement cap in accordance with the consumer price index.</p>	<p>The DPB analysis was directed to the potential fiscal impacts on the owners of sewage treatment works and on the local governments that may incur monitoring expenses that exceed the \$2.50 per dry ton fee. DPB was concerned that the commitment to raise the fee in relation to reimbursement claims would encourage local governments to perform non- essential monitoring and the fee could exceed the cap in approximately 30 years. These concerns will be addressed by initially closely reviewing local monitoring reimbursement claims to ensure that the claims are reasonable. Any deficiencies between the collected fees and the approved reimbursement claims will be corrected by subsequent regulation amendments.</p>
<p>Definitions of should and shall should be retained. Include a definition of soil and air pollution. Redefine the term “ Nutrient Management Plan.”</p>	<p>The definition of should and shall in the regulations was considered to be unnecessary by the Office of the Attorney General. Soil and air pollution are addressed by existing definitions. The Nutrient Management Plan definition will be deleted in response to a request received from the Department of Conservation and Recreation.</p>
<p>Limit the regulations advisory committee membership size and revise the list of appointed members. The recommended maximum numbers should range from 8 appointed members to 25 total members. In the list of appointed committee members include: biosolids generators, medical doctors, “independent” scientist, citizen’s representative, and regional wastewater organizations. Also, list VAMWA & VML separately.</p>	<p>The regulations advisory committee membership has historically exceeded 12 in order to provide knowledgeable feedback on this multi-disciplinary area of regulation. However, a maximum number of 25 is seen as a manageable number for providing the necessary level of informed input on this program. The list of appointed members in Section 270 should be revised to include a broader representation.</p>

SUMMARY OF COMMENT	AGENCY RESPONSE
<p>Provide for increases in the \$4.00 per dry ton cap on reimbursement of local monitoring expenses.</p> <p>Develop a formal policy to closely monitor the adequacy and equity of the biosolids fee and make adjustments when warranted.</p>	<p>The reimbursement cap was established as a reasonable cost containment measure at the recommendation of DPB. The reimbursement cap could be adjusted if subsequent approved reimbursement claims verify that the land application fee must be adjusted. A policy will be established to monitor the fee collections with respect to approved reimbursements.</p>
<p>Clarify that the proposed Biosolids Fee applies to sites within counties with adopted ordinances in accordance with the regulations.</p> <p>Replace term treated sewage sludge with biosolids.</p>	<p>The fifth sentence in the first paragraph of Section 660 A. should be revised accordingly.</p> <p>The term sewage sludge is used in HB 2827. Biosolids are defined in the regulations and should be used as the correct term.</p>
<p>Increase the land application fee from \$2.50 per dry ton to \$4 per dry ton.</p>	<p>The proposed biosolids fee was established by the VDH staff based on discussions of anticipated local monitoring expenses by the special Ad Hoc Advisory Committee and staff experience in monitoring past land application operations for more than 20 years. No credible evidence has been submitted to support the speculation that a fee of more than \$2.50 per dry ton is justified.</p>
<p>Partial reimbursement of local monitoring costs submitted for reimbursement is inconsistent with provisions of HB 2827 (01).</p>	<p>The DPB recommended the reimbursement cap for reasonable cost containment of local monitoring expenses.</p>
<p>A review of the permit application to include environmental protection may occur well in advance of actual land application operations for which reimbursement of local monitoring expenses would be requested. Local monitors should focus on regulations compliance issues, through field operation oversight and not on redundant analytical testing. Local monitors may not be qualified to evaluate potential health protection issues.</p>	<p>The proposed language in Section 690, item 1. should be revised to specify that charges for review of the actual permit prior to the start of operations is a reasonable cost.</p> <p>The need to train local monitors on the requirements specified in the regulations is recognized and such training will be implemented. The proposed language in Section 690, item 1. should be revised to include environmental protection.</p>

SUMMARY OF COMMENT	AGENCY RESPONSE
<p>The detailed guidance for reasonable testing and monitoring activities should be specified in the regulations.</p> <p>Local governments should be actively involved in the development of the guidance manual and program implementation.</p> <p>The Guidance Manual should not be referenced in the regulations as it has not been prepared at this time.</p>	<p>Recommendations for development of a separate Guidance Manual were discussed by the special Ad Hoc Advisory Committee. As it is not possible to anticipate the many issues that may develop in this new program, a guidance manual that can be routinely updated was thought to be the most practical means to instruct local monitors.</p> <p>Local governments will be requested to provide input to the Guidance Manual revisions.</p>
<p>Records should be made available for public access.</p>	<p>These records will be maintained in the Division files that are made available for public access.</p>
<p>VDH should establish that only monthly submissions of invoices are eligible for reimbursement and consider electronic submission of invoices as acceptable.</p>	<p>Section 710 B. will specify that reimbursement requests must be submitted monthly and electronic submissions of invoices will be acceptable if the proper signatures can be provided.</p>

Detail of Changes

Please detail any changes, other than strictly editorial changes, that are being proposed. Please detail new substantive provisions, all substantive changes to existing sections, or both where appropriate. This statement should provide a section-by-section description of changes implemented by the proposed regulatory action. Include citations to the specific sections of an existing regulation being amended and explain the differences that would be the effect of the changes.

The changes made to the proposed amendments are summarized as follows:

SECTION NUMBER	SUMMARY OF CHANGES
10	Removed the terms “should” and “shall”. Removed the definition of “ Nutrient Management Plan.” Revised the definition of “Operate.” Revised the definition of “Substantial Compliance” to include operations.
270	Revised the list of appointed members. The membership numbers range from 8 appointed members to 25 total members. In the list of appointed committee members included: County with land application activities, biosolids generators, medical professional, farmer, citizen’s representative, and regional wastewater organizations. Also, listed VAMWA & VML as separate representative agencies.
660 A.	Clarified that the proposed Biosolids Fee applies to sites within counties cities or towns with adopted ordinances in accordance with the regulations. Replaced term treated ‘sewage sludge’ with ‘biosolids.’
660 B.	1. The land application fee remains \$2.50 per dry ton
690 1.	Replaced the reimbursable charge for review of permit applications for local monitoring expenses, with a reimbursable charge for review of permit information prior to the start of operations. Revised the permit review objectives to include environmental protection.
690 2.	The reimbursable charges for reasonable testing and monitoring activities was revised to specify that collection and delivery of samples to a nearby laboratory would be a reimbursable expense.

710 B.	Revised the time frame for submittal of reimbursement applications from 120 days to 30 days of the time that expenses occurred, to establish monthly submission deadlines.
730 and 740.	Revised the reimbursement claim reconsideration language to remove any possible conflicts with the Administrative Process Act (APA). The specifics of these procedures will be addressed in the Biosolids Fee Guidance Manual.